Purple Communications, Inc. *and* Communications Workers of America, AFL–CIO. Cases 21–CA–095151, 21–RC–091531, and 21–RC–091584

September 24, 2014

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND SCHIFFER

At issue in this case are unfair labor practice allegations and election objections related to representation elections at two facilities of Respondent/Employer Purple Communications. On November 28, 2012,[1] elections were held for the interpreters at seven of Purple's call centers; the elections at Purple's Corona and Long Beach, California facilities are at issue here. The General Counsel alleges that Purple violated Section 8(a)(1) by maintaining two overbroad work rules: a rule prohibiting employees from "[c]ausing, creating or participating in a disruption of any kind during working hours on Company property" and an electronic communications policy prohibiting employees from using Purple's email system for any nonbusiness reason. The Union objects to the Corona and Long Beach election results based on Purple's no-disruptions rule and electronic communications policy, as well as campaign speeches given by Purple's president/chief executive officer.[2] We address those issues here with one exception: consistent with our notice and invitation to file briefs issued on April 30, 2014, we sever and hold for further consideration the question whether Purple's electronic communications policy was unlawful.[3]

The judge found that Purple's no-disruptions rule was overbroad and its maintenance of that rule at Corona and Long Beach was both unlawful and objectionable.[4] He further found unlawful a statement at Long Beach by John Ferron, Purple's president and CEO, that Ferron could not make improvements for employees at facilities where elections were pending but could do so at other facilities, and he sustained the Union's objection at Long Beach based on that statement. Relying on those findings and the close vote (15 for representation, 16 against, and 2 challenged ballots), the judge recommended that

[1] All dates are in 2012 unless stated otherwise.

[2] On October 24, 2013, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent/Employer filed exceptions and a supporting brief, and the General Counsel filed an answering brief. In addition, the General Counsel filed limited exceptions and a supporting brief, the Union filed cross-exceptions and a supporting brief, and the Respondent/Employer filed an answering brief to each. The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision, Order, and Direction of Second Election.

In the absence of exceptions, we adopt pro forma the judge's recommendation to overrule the Union's Objection 1, which claimed that the Respondent encouraged the preparation and circulation of an antiunion petition and allowed it to be circulated during worktime and in work areas.

The Union has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the judge's ultimate credibility findings. We conclude, however, that the judge erred in treating two employees' protected, concerted activity as evidence of testimonial bias. Thus, contrary to the judge, we do not rely on employee Ruth Usher's service as the Union's election observer or employee Robert LoParo's status as "one of the proponents of unionization who delivered the representation petition to the Employer" in assessing Usher's and LoParo's credibility. But the judge also relied on legitimate considerations, including the employees' demeanor, in making his credibility findings. We rely on only those legitimate considerations in adopting the judge's credibility determinations.

We decline the Union's requests that we overrule Board precedent in various respects. Regarding the Union's contention that "captive audience" meetings in the preelection period should be objectionable conduct, we note the equivocal evidence as to whether the meetings at issue here were in fact mandatory. Regarding our *Excelsior* list requirements, we note the Board's current consideration of that issue as part of the pending rulemaking process. See "Representation-Case Procedures," Notice of Proposed Rulemaking, 79 Fed. Reg. 7317 et seq. (Feb. 6, 2014). We also decline the Union's requests for additional remedies, with one exception: we grant the Union's request for the inclusion of language in the notice of election in accordance with *Lufkin Rule Co.*, 147 NLRB 341 (1964). See *Miller Industries Towing Equipment, Inc.*, 342 NLRB 1074, 1074 fn. 4 (2004) (holding that "[s]uch language is standard when requested").

We will modify the judge's recommended Order to conform to the Board's standard remedial language and in accordance with our decision in *Guardsmark, LLC,* 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007). Finally, we will substitute a new notice in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014), and we will direct the Regional Director to include in the notice of election the same language that *Durham School Services* requires in remedial notices.

[3] The judge found the electronic communications policy lawful based on *Register Guard*, 351 NLRB 1110 (2007), enfd. in relevant part and remanded sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009). The General Counsel argues that *Register Guard* should be overruled, and our April 30, 2014 notice and invitation to file briefs sought input from the parties and amici on that question. Accordingly, today's decision does not address *Register Guard* or Purple's electronic communication policy on the merits.

[4] The parties stipulated that the employee handbook containing the rule has been in effect at the Corona and Long Beach facilities since June 2012.

the Long Beach election be set aside.[5] With respect to the Corona election, however, the judge sustained only the one objection based on the no-disruptions rule and found that the election there, where the vote was "not particularly close" (10 for, 16 against, and 1 challenged ballot), should stand. We adopt the judge's findings on the no-disruptions rule for the reasons he stated, and we agree with the judge's rationale for finding that Ferron's statement at Long Beach was objectionable.[6] For the reasons explained below, we conclude that certain additional statements by Ferron were objectionable and that the elections at both Long Beach and Corona must be set aside.

Facts

Purple is in the business of offering sign language interpretation services. Purple's employees, known as video relay interpreters, provide two-way, real-time interpretation of telephone communications between deaf or hard of hearing individuals and hearing individuals. The interpreters typically use an audio headset to communicate orally with the hearing participant on a call, leaving their hands free to communicate in sign language, via video, with the deaf participant. The interpreters work at 16 call centers that process calls on a nationwide, around the clock, "first come, first served" basis.

During the weeks preceding the elections, Ferron made speeches to large groups of interpreters at each of the seven call centers where an election was to take place. Ferron spoke at both Corona and Long Beach on November 16. Relying on notes that he prepared after consultation with the Respondent's legal counsel and labor relations consultant, he gave a 45–60 minute presentation at each facility, followed by 30–45 minutes of questions and answers. Ferron spoke about a checklist of issues that he considered relevant to the employees' choice in the upcoming elections, but, as the judge found, Ferron did not read from a script and could not recall exactly what he had said at one facility versus another. The topics he covered, however, included Hostess Bakery's then recent bankruptcy filing;[7] Purple's financial difficulties and its expectation that revenues would soon decrease;[8] the company's priorities in bargaining if the Union won the elections; and the company's expenditures in opposing the union campaigns. Ferron asked the interpreters to give Purple a chance to address their concerns before they brought in a union.

The election campaign focused significantly on productivity standards, which the company had increased in September or early October, shortly before the Union filed its election petitions. The productivity standards affected both the physical demands on the interpreters and their eligibility for bonuses. About November 21, Purple notified interpreters that it was easing its enforcement of the standards. Even after the adjustment, however, the burden on them remained higher than it had been before the early-fall increase.

Ferron's Speeches at Corona and Long Beach

In his speeches at both Corona and Long Beach, Ferron asked the interpreters to "give [him] another 12 months" to address their concerns. He expressed the hope that, through improved communication and input, they could "collectively solve" the issues that had caused employees to "turn[] toward a Union vote" and suggested that the employees could evaluate whether conditions improved and "address a Union situation 12 months later."[9] Ferron also discussed interpreters' concerns over the productivity standards, saying that they were "always fluid" and that the increased standards were in the interpreters' "best interest despite how they felt about them" because increased productivity was a way for management to avoid layoffs and pay cuts. But, Ferron said, "interpreter health and safety . . . had to come first and foremost." He added that the company might have gone too far and "needed to recalibrate" the productivity standards; they "were looking at that matter."

Ferron also discussed the money that Purple had spent opposing the Union, stating that the money could have been used for other purposes. Ferron credibly testified that he had said at the meetings:

> And to the degree that we would have communicated better and wouldn't have incurred the cost to fly around the country and encourage a no-vote to these union call

[5] The challenged ballots would have been determinative, but the parties have stipulated that the two challenged voters were ineligible.

[6] We do not, however, find that statement unlawful, as the judge did, because it was not alleged to be unlawful, only objectionable.

[7] Media coverage of the Hostess bankruptcy filing connected it to the bargaining demands of the union that represented its employees.

[8] Ferron testified that government reimbursements for Purple's telephone interpretation services account for about 95 percent of the company's revenue. The reimbursement rates are set by federal administrative order. At the time of the union campaigns, a new order was overdue, and it was widely expected that reimbursement rates would be lowered. The reimbursement order then in effect was itself lower than the prior effective rate, and Purple had responded to that reduction by making significant operational changes, including closing and then reopening the Long Beach facility (with reduced pay for interpreters). Ferron testified that he did not intend to close any facilities at the time of the elections.

[9] As the judge discussed regarding the Union's Objection 1, about that time interpreters were circulating petitions to cancel the elections and give Purple another chance.

> centers, think of how much more money the company would have had from a discretionary standpoint.
>
> And then we could have done a lot of things with it. We could have invested in further product development. We could have given spot bonuses to interpreters. A lot of things we could have done that--you know--that money has kind [of] leaked out of the company.

The judge also credited the testimony of Long Beach interpreters Robert LoParo and Angela Emerson regarding Ferron's statements at that facility. According to LoParo, Ferron said either, "We've spent so much money on the unionization issue . . . that we should have just paid out the bonus," or, if not for the campaign costs, Purple could have "possibly paid out bonuses to" the interpreters. According to Emerson, Ferron said that the Respondent had not paid bonuses because employees had not earned them under the new standards and Ferron "didn't want to have to spend all this money on a union buster, that . . . he should have just used all that money to just pay us our bonuses." The judge also found that LoParo was "paraphrasing what he took to be Ferron's message" when LoParo testified: "In effect, he was saying, '[f]ighting the union now is taking out the resources that I would have normally given to you, but now that you're going pro-union that . . . means that you can't earn that money, that bonus. It's not available for you anymore.'"[10]

Analysis

The Union's Objections 3, 4, and 5 are based on Ferron's statements at his meetings with Corona and Long Beach interpreters. Collectively, those objections assert that Purple threatened bankruptcy, closure, loss of work, and loss of benefits if the interpreters supported the Union, and offered them benefits for not supporting the Union. Contrary to the judge, we find that Ferron implicitly promised improvements in the productivity standards and implicitly threatened the interpreters by telling them that Purple's expenditures to oppose the Union could instead have been spent on employee bonuses.[11] For the reasons explained below, we find those statements, which were made at both Corona and Long Beach, objectionable.

The Board has long held that "[a]n election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammeled choice for or against a bargaining representative." *General Shoe Corp.*, 77 NLRB 124, 126 (1948), enfd. 192 F.2d 504 (6th Cir. 1951), cert. denied 343 U.S. 904 (1952). Accordingly, in assessing whether campaign statements are objectionable, we consider whether they "ha[d] the tendency to interfere with the employees' freedom of choice." *Cambridge Tool & Mfg. Co.*, 316 NLRB 716, 716 (1995).[12]

Whether analyzing alleged unlawful statements or alleged objectionable conduct, the Board "view[s] employer statements from the standpoint of employees over whom the employer has a measure of economic power." *Mesker Door*, 357 NLRB No. 59, slip op. at 5 (2011) (internal quotation and citation omitted). That approach comports with the Supreme Court's admonition that the Board "take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." Id. (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)). Finally, the Board analyzes the employer's speech as a whole to assess whether particular statements are unlawful or objectionable. Id. We review Ferron's allegedly objectionable statements under those principles.

Offers of Benefits

The judge considered it a close question whether Ferron promised to improve the productivity standards, as the Union contended. The judge concluded, however, that Ferron had not actually promised anything by stating that the company might have gone too far in increasing the standards and that he was looking into the matter as

[10] The judge found that LoParo was not reporting Ferron's exact words in that testimony. Nonetheless, as explained below, we consider the meaning that employees would reasonably take from Ferron's words in assessing his statements' effect on the employees' free choice in the election.

[11] Ferron's reference to "invest[ing] in further product development" appears to relate to improving Purple's proprietary software that interpreters used for their work. Absent record clarification of that meaning, however, we do not address whether Ferron's reference to investing in product development constituted an additional objectionable threat that the union campaigns had cost the interpreters improvements in their working conditions.

[12] "[T]he test of conduct which may interfere with the 'laboratory conditions' for an election is considerably more restrictive than the test of conduct which amounts to interference, restraint, or coercion which violates Section 8(a)(1)." *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786–1787 (1962); see also *Heartland Human Services v. NLRB*, 746 F.3d 802, 804 (7th Cir. 2014) ("Objectionable conduct, though it is a ground for setting aside the results of a representation election if the conduct is found to have interfered with the voters' free choice, need not be *so* objectionable as to constitute an unfair labor practice.") (Internal quotations and citations omitted; emphasis in original). In the present case, however, the judge relied on cases addressing whether campaign statements were lawful rather than whether they were objectionable.

part of ongoing "recalibrat[ing]." In reaching that conclusion, the judge relied on *Noah's New York Bagels*, 324 NLRB 266, 266–267 (1997) (employer's "generalized expressions . . . asking for 'another chance' or 'more time,' have been held to be within the limits of permissible campaign propaganda" when employer does not "make any specific promise that any particular matter would be improved") (citing *National Micronetics*, 277 NLRB 993 (1985)). We find *Noah's New York Bagels* and *National Micronetics* distinguishable, however, because Ferron's statements were not limited to "generalized expressions" asking for more time. Rather, his implied promises of improvements were directly linked to the recently increased productivity standards, which were a central campaign issue and a significant physical and financial concern for interpreters. Ferron acknowledged that the productivity standards might have been raised too high and that he regretted having done so; he then added that Purple was "looking into" "recalibrating" the standards. Although he made no express promise to take specific action on the matter, Ferron's statements indicated that action was being contemplated, and arguably was likely, to respond to the interpreters' key concern.[13] We conclude that Ferron's implied promises of improvements in the productivity standards, viewed in context and from the standpoint of the employees, had the tendency to interfere with their freedom of choice in the election and thus were objectionable.

Statements Regarding the Costs of Purple's Antiunion Campaign

We also find objectionable Ferron's statements about the money that Purple had spent opposing the union campaign and how it could have been used otherwise, including by giving bonuses to the interpreters. Many Board decisions have found similar statements unlawful. For example, in *Mesker Door*, 357 NLRB No. 59, slip op. at 2–6 (2011), the employer's plant manager gave a speech in which he stated that the $200,000 the employer had paid to its attorneys because of the union could otherwise have gone into improving life at the plant. In the context of additional statements suggesting there would have been higher bonuses absent the adversarial atmosphere created by employees' filing of unfair labor practice charges, the Board found the plant manager's statements threatened employees with economic loss for their protected activity. Similarly, in *Pilot Freight Carriers, Inc.*, 223 NLRB 286, 286 fn. 1 (1976), the Board reversed the judge's dismissal of an allegation regarding the president's statement that his company had spent $10,000 on attorney fees to counter the union, money that otherwise would have gone to employees. In finding the violation, the Board explained that "[t]he point, and the vice of the statement, is the assertion that but for the Union the employees would have received $10,000 and the implication that further union activities would deprive the employees of pay they might otherwise receive." Id.[14]

The Union contends that Ferron's statements about the antiunion campaign costs were coercive. We agree.[15] Ferron's statements, like those in the precedents cited above,[16] would reasonably have communicated to inter-

[13] In a memo to the interpreters dated November 19 (i.e., 3 days after Ferron's speeches), and distributed about a week before the election, Purple set forth modifications of the productivity standards intended to reduce the burden on interpreters. Those modifications essentially created a safe harbor for interpreters who met the heightened productivity standards during the first portion of their shifts.

The Union had notified Ferron on November 20, that the new standards were causing the interpreters "physical pain" and had stated that it would "take no legal action, including the filing of any unfair labor practice charges," if Purple lowered those standards. Consistent with that notice, the Union did not file unfair labor practice charges, or even election objections, regarding the modifications. Ferron's November 16 statements, however, are a separate issue, and the Union's pledge not to file charges regarding implemented improvements does not preclude it from objecting to the implied promises' effect on the elections. Nor did the actual improvements negate the coercive effect of the implied promises, as Purple argues, given that the interpreters' concerns were not fully resolved by the improvements and in the absence of evidence that they knew the Union had authorized Purple to make improvements.

[14] See also *Chinese Daily News*, 346 NLRB 906, 906–907 (2006) (finding unlawful threat of adverse consequences for engaging in protected activity in newspaper editor's statements that employee's note-taking would be used for union lawsuits that would cost the company in lawyer fees and reduce employees' benefits, including their bonuses); *Great Western Produce*, 299 NLRB 1004, 1023 (1990) (finding unlawful co-owner's statement to employees named in unfair labor practice charge that "the charges were costing him money, that only the lawyers were benefitting, and that neither the Union nor he were gaining anything from the NLRB proceedings"); *Pine Valley Meats, Inc.*, 255 NLRB 402, 402 fn. 2, 407–408, 410 (1981) (finding unlawful part-owner/president's statement that money the employer would have to spend on attorneys for contract negotiations if the union succeeded could otherwise be spent on employee benefits; judge explained that statement constituted both promise of benefits and threat of lost benefits, depending on whether employees voted to unionize); *Transway, Inc.*, 184 NLRB 50, 53 (1970) (finding unlawful statements of employer's president that most of the $80,000 spent on legal fees in election cases would have gone to employees in pension or profit sharing benefits and that money for additional costs "can only come out of the employees' pockets").

[15] We do not find it significant that the Union addressed Ferron's statements about campaign costs in its discussion of one objection versus a different one; it suffices that the undisputed statements, which Ferron himself testified to, are within the scope of both the Union's objections and its arguments in support of its objections and that they would have a tendency to affect employees' free choice in the elections.

[16] Although the cited cases involve unfair labor practices rather than objections, as explained above, conduct that violates Sec. 8(a)(1) is, a fortiori, objectionable. See *Dal-Tex*, 137 NLRB at 1786.

preters that their union campaign had potentially cost them bonuses and might continue to do so.[17] Because Ferron was Purple's president and CEO, his statements about how the company would have spent its money would likely have carried particular weight with employees. We find that Ferron's statements about the money Purple had spent on its antiunion campaign were objectionable.

In sum, we find that Purple engaged in the following objectionable conduct: maintenance, and possibly application, of an unlawful no-disruptions rule;[18] Ferron's implied promises to improve the productivity standards; Ferron's implied threat that interpreters' union campaign and Purple's response had cost them bonuses; and, at Long Beach, Ferron's statement that he could make improvements only at the facilities that did not have elections pending.[19] We therefore partially sustain union Objection 2 (with regard to Purple's no-disruptions rule) and Objections 3, 4, and 5 (with regard to the implied promises and threats by Ferron, as specified).[20]

We further conclude that the objectionable conduct, considered either in the aggregate or separately, could have affected the election results and thus warrants setting aside both the Corona and the Long Beach elections. First, we reject the judge's conclusion that the unlawful no-disruptions rule was insufficient, standing alone, to require new elections. The rule applied to all Corona and Long Beach employees throughout the critical period, and its extraordinary breadth could have discouraged interpreters from engaging in many types of permissible campaigning.[21] As the Board explained in *Jurys Boston Hotel*, 356 NLRB No. 114 (2011) (setting aside election based on maintenance of overbroad rules during critical period), "[w]here a representation proceeding and an unfair labor practice case have been consolidated and an unfair labor practice found, . . . the election must be set aside unless 'it is virtually impossible to conclude that the misconduct could have affected the election results.'" *Jurys Boston*, slip op. at 2 fn. 8 (citing *Clark Equipment Co.*, 278 NLRB 498, 505 (1986)).[22] At Corona, changing only three employees' votes could have reversed the election's outcome (depending on the challenged ballot); at Long Beach, a single changed "no" vote would have made the difference. In those circumstances, we cannot conclude that it is virtually impossible that the no-disruptions rule affected the election results at either Corona or Long Beach. Similarly, Ferron's speeches were directed to large groups of each facility's employees, and the implied promises and threats in those speeches were heard by enough employees to affect the outcome of each facility's vote. Accordingly, we set aside both elections.

ORDER

The National Labor Relations Board orders that the Respondent, Purple Communications, Inc., Corona and Long Beach, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a rule that prohibits employees from "causing, creating, or participating in a disruption of any kind during working hours on Company property" or that otherwise creates an overly broad restriction on disruptions that interferes with the Section 7 rights of employees to engage in union and protected concerted activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[17] We note that LoParo testified that he understood Ferron's statements to have that meaning.

[18] The parties stipulated that the employee handbook containing the rule has been "in effect and applied" at the Corona and Long Beach facilities.

As stated above, we agree with the judge's reasons for finding the no-disruptions rule unlawful and objectionable.

[19] In adopting the judge's finding that that statement was objectionable, we reject Purple's contentions that the judge took portions of Ferron's statement out of context and that precluding Ferron from making such a statement would silence Purple regarding the "hot topic" of productivity standards. As to the latter, the circumstances under which employers may lawfully change wages or benefits during a union campaign are well established. See, e.g., *Lampi, L.L.C.*, 322 NLRB 502, 502 (1996). Rather than describing the restrictions on his ability to make changes during the campaign consistently with the Act, Ferron misstated his options in a way that indicated that the interpreters' protected choice to seek union elections made them ineligible for benefits that they could have had otherwise.

[20] As we are setting aside the election on those grounds, we find it unnecessary to pass on other portions of the judge's findings regarding the Union's Objections 3–5. Thus, we need not address whether other statements by Ferron, including those regarding Hostess, making Purple an "employer of choice," and Ferron's intentions regarding bargaining if the Union became the employees' representative, constituted additional implied threats or promises of benefits.

[21] Although the testimonial evidence of the rule's dissemination to employees is somewhat limited, Purple stipulated that it had maintained the employee handbook since at least June 19, and the policies in the handbook applied to both facilities' employees.

[22] The judge relied on *Delta Brands*, 344 NLRB 252 (2005), in finding that Purple's maintenance of the no-disruptions rule did not require a new election. We express no view on whether *Delta Brands* was correctly decided, but, in any event, we find it distinguishable. The rule in *Delta Brands* was not alleged to be unlawful, and therefore the Board did not apply the "virtually impossible" standard. Furthermore, it is unclear from the parties' stipulation whether the present case involves the mere *maintenance* of an unlawful rule, as in *Delta Brands*. As previously stated, the parties stipulated that the employee handbook containing the rule has been "in effect and applied" at the Corona and Long Beach facilities.

(a) Rescind the rule in its employee handbook that prohibits employees from "causing, creating, or participating in a disruption of any kind during working hours on Company property."

(b) Furnish employees with an insert for the current employee handbook that (1) advises that the unlawful provision has been rescinded, or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision; or publish and distribute to employees revised employee handbooks that (1) do not contain the unlawful provision, or (2) provide a lawfully worded provision

(c) Within 14 days after service by the Region, post at its Corona and Long Beach, California facilities copies of the attached notice marked "Appendix."[23] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed a facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 19, 2012.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the elections held on November 28, 2012, in Cases 21–RC–091531 and 21–RC–091584 are set aside and that those cases are severed and remanded to the Regional Director for Region 21 for the purpose of conducting new elections as directed below. The Regional Director shall include in the notices of election the following paragraph:

[23] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

NOTICE TO ALL VOTERS

> The election conducted on November 28, 2012 was set aside because the National Labor Relations Board found that certain conduct of the Employer interfered with the employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit and protects them in the exercise of this right, free from interference by any of the parties.

The notices of election shall also contain the following language, set forth in *Durham School Services*, 360 NLRB No. 85 (2014), and QR code:

> The Board's decision can be found at www.nlrb.gov/case/21-CA-095151 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the units found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for

cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the date of the first election and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Communications Workers of America, AFL–CIO.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington, D.C. September 24, 2014

Mark Gaston Pearce,	Chairman
Kent Y. Hirozawa,	Member
Nancy Schiffer,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a rule that prohibits you from "causing, creating, or participating in a disruption of any kind during working hours on Company property" or that otherwise creates an overly broad restriction on disruptions that interferes with your Section 7 rights to engage in union and protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the rule in our employee handbook that prohibits you from "causing, creating, or participating in a disruption of any kind during working hours on Company property."

WE WILL supply you with an insert for the current employee handbook that (1) advises that the unlawful provision has been rescinded, or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision; or WE WILL publish and distribute revised employee handbooks that (1) do not contain the unlawful provision, or (2) provide a lawfully worded provision.

PURPLE COMMUNICATIONS, INC.

The Board's decision can be found at www.nlrb.gov/case/21-CA-095151 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.

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Lisl R. Duncan, Esq. (Weinberg, Roger & Rosenfeld), of Los Angeles, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. I heard these consolidated unfair labor practices and representation cases in Long Beach, California, on June 10 and 11, 2013. Communications Workers of America, AFL–CIO (the Union, the Charging Party, or the Petitioner) filed the charge on December 18, 2012, alleging that Purple Communications, Inc. (the Employer, the Respondent, Purple, or the Company) had committed unfair labor practices by maintaining rules that unlawfully interfered with employees' rights to engage in protected concerted activity. Representation elections were held at a number of the Employer's locations on November 28, 2012, including the locations in Corona, California, and Long Beach, California. At the Corona facility, 10 ballots were cast for the Union and 16 ballots against the Union, with 1 challenged ballot. At the Long Beach facility, 15 ballots were cast for the Union and 16 ballots against the Union, with 2 challenged ballots.[1] The Union filed timely objections to preelection conduct at those locations.

On April 22, 2013, the Regional Director for Region 21 of the National Labor Relations Board (the Board) issued a complaint alleging that the Employer had committed unfair labor practices in violation of Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining two rules that interfered with employees' rights under Section 7 of the Act. The Employer filed a timely answer in which it denied that the rules violated the Act. On April 30, 2013, the Regional Director for Region 21 issued a report on challenged ballots and objections and an order consolidating the cases regarding those matters with the unfair labor practices case for purposes of hearing.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Union, and the Employer, I make the following findings of fact and conclusions of law

FINDINGS OF FACT

I. JURISDICTION

The Employer, a corporation, provides interpreting services to deaf and hard of hearing individuals, from its facilities in Corona, California, and Long Beach, California, where it annually performs services valued in excess of $50,000 for customers in states other than the State of California. The Employer admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] At the start of trial, the Respondent and the Union stipulated that the challenged ballots at the Long Beach facility were cast by ineligible voters and should not be counted.

II. BACKGROUND FACTS

The Employer is a provider of communication services for deaf and hard of hearing individuals. The primary service it provides is sign language interpretation during video calls. An employee known as a "video relay interpreter" or "VI" facilitates communication between a hearing party and deaf party by interpreting spoken language into sign language and sign language into spoken language. The Employer offers its video call interpretation services 24 hours a day, 7 days a week, from 15 call center facilities across the United States. In 2012, interpreters at seven of those facilities engaged in campaigns for union representation. The allegations in this case concern two facilities at which union representation elections were held on November 28, 2012. At one of those facilities, located in Corona, California, the Employer employs approximately 30 interpreters. At the other, located in Long Beach, California, the Employer employs approximately 47 interpreters.

III. UNFAIR LABOR PRACTICES

A. Facts

The Employer's video relay interpreters "process" calls using company provided computers located at their workstations. The interpreters can use these workstation computers to access the Employer's intranet system and various work programs, but the computers have limited, if any, access to the internet and nonwork programs. The Employer assigns an email account to each video interpreter, and the interpreters can access these accounts from the workstation computers as well as from their home computers and smart phones. Employees routinely use the work email system to communicate with each other, and managers use it to communicate with employees and other managers. At the Corona and Long Beach facilities, the Employer also maintains a small number of shared computers that are located in common areas and from which employees are able to access the internet and nonwork programs.

The Employer has an employee handbook that sets forth its policies and procedures. The unfair labor practices alleged in this case concern two handbook policies that the Employer has maintained since about June 19, 2012, and which the parties stipulate were in effect at all times relevant to this litigation. The first policy provides as follows:

> The following acts are specifically prohibited and will not be tolerated by Purple. Violations will result in disciplinary action, up to and including terminations of employment.
>
> . . . .
>
> Causing, creating, or participating in a disruption of any kind during working hours on Company property.

The second handbook policy at issue concerns internet, intranet, voicemail, and electronic communications. The portions that are alleged to violate the Act provide as follows:

> Computers, laptops, internet access, voicemail, electronic mail (email), Blackberry, cellular telephones and/or other Company equipment is provided and maintained by Purple to facilitate Company business. All information and messages stored, sent, and received on these systems are the sole and

> exclusive property of the Company, regardless of the author or recipient. All such equipment and access should be used for business purposes only.
>
> . . . .
>
> Employees are strictly prohibited from using the computer, internet, voicemail and email systems, and other Company equipment in connection with any of the following activities:
>
> . . . .
>
> 2. Engaging in activities on behalf of organization or persons with no professional or business affiliation with the Company.
>
> . . . .
>
> 5. Sending uninvited email of a personal nature.

The Employer is authorized to punish an employee's violation of this policy with discipline up to and including termination. Ferron testified that the reason interpreters are prohibited from using their workstation computers for personal use is to prevent computer viruses from contaminating the call center.

B. Analysis

1. The General Counsel argues that the Employer's maintenance of the handbook policy prohibiting employees from "[c]ausing, creating, or participating in a disruption of any kind during working hours on Company property" violates Section 8(a)(1) of the Act because it sets forth an overly broad restriction that interferes with the Section 7 rights of employees to engage in union and/or protected concerted activity. In determining whether the maintenance of a rule violates Section 8(a)(1), the appropriate inquiry is whether the rule would "reasonably tend[ ] to chill employees in the exercise of their Section 7 rights." *Knauz BMW*, 358 NLRB No. 164, slip op. at 1 (2012), citing *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). Under this standard, a rule that explicitly restricts Section 7 rights is unlawful. Id., citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). If a rule does not explicitly restrict Section 7 rights, the General Counsel may establish a violation by showing any one of the following: (1) that employees would reasonably construe the language to prohibit Section 7 activity; (2) that the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. Id., citing *Lutheran Heritage*, 343 NLRB at 647.

The Employer's prohibition on "causing, creating, or participating in a disruption of any kind during working hours on Company property" does not explicitly restrict Section 7 activity, however, the General Counsel argues that the policy violates the Act because it would reasonably be interpreted to do so. This argument is supported by Board precedent. In *Heartland Catfish Co.*, the Board found that an employer rule that prohibited employees from "engaging or participating in any interruption of work" violated Section 8(a)(1) of the Act because it would reasonably be interpreted by employees "to prohibit participation in a protected strike." 358 NLRB No. 125, slip op. at 1–2 (2012). Similarly, in *Labor Ready, Inc.,* the Board held that an employer's rule that "Employees who walk off the job will be discharged" was overbroad and unlawful. 331 NLRB 1656 (2000). In *North Distribution, Inc.*, the administrative law judge ruled on exactly the same disruption language that is at issue here. 2002 WL 991684 (2002). In that case the judge held that the rule violated Section 8(a)(1) because its language was "overbroad and could be interpreted as barring Section 7 activity, including the right to engage in a work stoppage." Id. Although I am not bound by the judge's decision,[2] I find his reasoning persuasive. Because the Employer's prohibition does not define or limit the meaning of "disruption" or state that it is not intended to refer to Section 7 activity, I find that employees would reasonably interpret it to outlaw some such activity.

To support its contention that the rule prohibiting employee disruptions is permissible, the Employer relies on the fact that the rule only prohibits disruptions during working hours. The Employer cites *Daimler-Chrysler Corp.*, 344 NLRB 1324 (2005), and argues that the "disruption" language would not interfere with lawful strike activity because strikes are not protected unless they occur on nonwork time. This contention is not persuasive for several reasons. First, I note that the prohibition on "disruptions" is so broad that it can reasonably be understood to apply not only to strike activity, but also to other forms of protected Section 7 activity, including, for example, solicitation. In addition, while the Employer argues in its brief that the Company is entitled to prohibit union activities during working "time," the rule at issue is not, in fact, limited to working time. Rather the prohibition explicitly extends to the entire "working hours" period. The Board has long held that the phrase "working hours," unlike the phrase "working time," encompasses periods that are the employees' own time such as meal times and break periods, as well as times when employees have completed their shifts but are still on the company premises pursuant to the work relationship. *Grimmway Farms*, 314 NLRB 73, 90 (1994), enfd. in part 85 F.3d 637 (9th Cir. 1996) (table); *Wellstream Corp.,* 313 NLRB 698, 703 (1994); *Keco Industries*, 306 NLRB 15, 19 (1992). For this reason, the Board has held that a rule prohibiting union solicitation during "working hours" is presumptively invalid, even though a presumption on solicitation during "working time" is generally lawful. Id.; see also *Our Way*, *Inc.*, 268 NLRB 394, 394–395 (1983), citing *Essex International, Inc.,* 211 NLRB 749 (1974). This distinction is particularly significant here since the Employer operates 24 hours a day, 7 days a week—meaning that the prohibition on disruptions during "working hours" arguably applies to *all* hours of the day and night. Moreover, the rule does not only prohibit employees from directly participating in a disruption, but also from "causing" or "creating" a disruption that takes place during working hours on company property. Employees could reasonably fear that this would allow the Employer to discipline them for participating in meetings or other Section 7 activities that take place during nonwork time and away from the workplace if those activities are causally linked to a disruption at the facility. Lastly, I note that the Employer incorrectly assumes that any strike that ran afoul of its rule prohibiting disruptions during working hours on company

[2] There is no Board decision reviewing the administrative law judge's decision in *North Distribution, Inc.*, supra.

property would be a sit-down strike or slow down and, therefore, unprotected by the Act. See Respondent's Brief at p. 14, citing *Daimler-Chrysler Corp.*, supra. This overlooks the scenario in which a strike begins when employees walk off the job and exit the facility. Such strikes are generally protected by the Act. See, e.g., *Labor Ready, Inc.*, supra, but would nevertheless be prohibited by the Employer's rules since the disruption would begin during working hours on company property.

For the reasons discussed above, I conclude that the Employer's maintenance of the rule prohibiting employees from "[c]ausing, creating, or participating in a disruption of any kind during working hours on Company property" violates Section 8(a)(1) of the Act because it sets forth an overly broad restriction that interferes with the Section 7 rights of employees to engage in union and/or protected concerted activity.

2. The General Counsel also alleges that the Employer interfered with employees' exercise of Section 7 rights in violation of Section 8(a)(1) by maintaining overly-broad rules that prohibit the use of its equipment, including computers, internet, and email systems for anything other than business purposes, and which specifically prohibit the use of that equipment for "engaging in activities on behalf of organizations or persons with no professional or business affiliation with the company." While the General Counsel makes this allegation, it concedes that finding a violation would require overruling the Board's decision in *Register-Guard*, 351 NLRB 1110 (2007), enfd. in part sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009). In that decision the Board held that "employees have no statutory right to use the Employer's e-mail system for Section 7 purposes" and therefore that an employer does not violate Section 8(a)(1) by maintaining a prohibition on employee use of its email system for "nonjob-related solicitations." The General Counsel argues that *Register-Guard* should be overruled, inter alia, because of the increased importance of email as a means of employee communication. If the General Counsel's arguments in favor of overruling *Register-Guard* have merits, those merits are for the Board to consider, not me. I am bound to follow Board precedent that has not been reversed by the Supreme Court. See *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004); *Hebert Industrial Insulation Corp.*, 312 NLRB 602, 608 (1993); *Lumber & Mill Employers Assn.*, 265 NLRB 199 fn. 2 (1982), enfd. 736 F.2d 507 (9th Cir. 1984), cert. denied 469 U.S. 934 (1984).

Therefore the allegation that the Employer violated Section 8(a)(1) by maintaining rules that prohibit the use of company equipment for anything but business purposes should be dismissed.

IV. CHALLENGED BALLOTS

The Employer challenged the ballots of two individuals—Martin Garcia and LeeElle Tullis—who cast ballots in the representation election at the Long Beach facility. Those ballots are sufficient in number to affect the outcome of the Long Beach election. The Employer challenged these ballots on the grounds that the individuals had not worked the requisite number of hours to qualify to vote. At trial, the Union and the Employer stipulated that the two challenges should be sustained, and that the ballots of Garcia and Tullis should not be counted. No testimony or documentary evidence was presented on the subject. Given that the parties have stipulated to the validity of the ballot challenges, I conclude that the ballots of Garcia and Tullis should not be opened or counted.

V. OBJECTIONS TO THE ELECTION

In October 2012, the Union filed petitions for representation elections at the Corona and Long Beach facilities. On October 25, the Union and the Employer entered into stipulated election agreements for elections at both of those facilities to be held on November 28 for bargaining units comprised of all full-time and part-time video interpreters. The elections were held as scheduled and the Union filed postelection objections. The Regional Director for Region 21 directed that a hearing be held on the six objections filed by the Union regarding the election at the Corona facility (Case 21–RC–091531) and the election at the Long Beach facility (Case 21–RC–091584). The Union's objections, which are identical for both facilities, are as follows:

> 1. The employer encouraged a decertification petition to be prepared and circulated in the bargaining unit. It furthermore allowed employees to circulate this petition during worktime and in work areas.
>
> 2. The employer maintained and enforced unlawful rules in the workplace which interfered with the exercise of rights guaranteed by Section 7 and interfered with the election.
>
> 3. The employer made threats of bankruptcy and threatened employees with closure of the facility or loss of work if the workers voted or supported the Union.
>
> 4. The employer made offers of benefits and bribes to employees if they would not support the Union.
>
> 5. The employer otherwise threatened employees with loss of benefits if the employees supported the Union.
>
> 6. The *Excelsior* List was inadequate. It did not contain email address[es], work shifts, rates of pay, and phone numbers.

These objections are discussed below.

OBJECTION 1: The employer encouraged a decertification petition to be prepared and circulated in the bargaining unit. It furthermore allowed employees to circulate this petition during worktime and in work areas.

The Board has stated that an employer has no legitimate role in instigating or facilitating a decertification petition and may not solicit employees to circulate or sign it. *Armored Transportation, Inc.*, 339 NLRB 374, 377 (2003); cf. *Bridgestone/Firestone, Inc.*, 335 NLRB 941, 941–942 (2001) (Employer did not violate the act when employee decided of his own volition to file a decertification petition, and employer did not provide more than ministerial assistance.); *Ernst Home Centers*, 308 NLRB 358 (1992) (same). Objection 1 refers to the petitions that employees submitted in an effort to cancel the November 28, 2012 representation elections as "decertification petitions." This is a misnomer inasmuch as the Union was not the certified collective-bargaining representative of interpreters at either facility and therefore could not be "decertified." Nev-

ertheless, I believe it is appropriate to apply the standard quoted above to the question of whether the Employer unlawfully involved itself in the petition to cancel the election. I find that under that standard, the Union has failed to show that the Employer instigated, facilitated, circulated, improperly permitted, or otherwise unlawfully involved itself in the petitions at the Corona and Long Beach facilities.

The record evidence shows that shortly before the representation elections were held at the Corona and Long Beach facilities, interpreters at those facilities circulated identically worded petitions, which stated that the signing employees "wish to withdraw our request to unionize at this time, thereby canceling the vote that is scheduled to occur on November 28, 2012." The petitions also stated that "[b]y agreeing to withdraw, the undersigned are neither stating support for or against unionization, rather, we see wisdom in allowing Purple, our employer, to realize that they have been lax in addressing their employees' concerns and taking supportive action." After obtaining a number of signatures in support of the petitions, the proponents of the petitions transmitted copies to the Board, the Union, and the Employer. The letter transmitting the Corona petition is dated November 19, 2012, and the letter transmitting the Long Beach petition is dated November 26, 2012.

Prior to when the proponents of the petition transmitted it, video interpreters Judith Kroeger and Ruth Usher observed coworkers circulating the petition from work station to work station at the Corona location during working hours. Kroeger also saw the petition displayed in the Corona breakroom. On November 14, Kroeger sent an email message to facility manager, Sam Farley, stating:

> I just wanted to touch bas[e] with you as several VIs are approaching me stating that they are being accosted in their stations while working by other VIs not in support of the union. They are telling me they are being bribed with promises and coerced into agreements by these individuals while on company time.

Kroeger testified that the persons circulating the petition were rank-and-file interpreters who lacked authority to promise changes in working conditions. Later that day, Farley responded to Kroeger by email as follows:

> Thank you for bringing this to my attention. You are correct that I will not stand for any harassment in the workplace especially to the level that people are being accosted in their stations. If you would like to give me more specific information I can look into this further. I understand that you do not want to disclose any specific details in which case I will do my best to keep my eyes and ears open. Also . . . if people are coming to you, please encourage them to come and speak with me as well so I can make sure this is . . . dealt with appropriately.

The next day, November 15, Kroeger responded:

> Thank you Sam, and I have been directing individuals, but not everyone feels comfortable nor wants to contribute to what is going on. I know that the only way for you to effectively handle it would be for them to come to you. Thank you for making the extra effort to be more aware. I and many others are truly appreciative.

Kroeger testified that she did not see the petition being circulated again after the above email exchange with Farley.

Farley testified that he was not aware that any employees were circulating a petition to cancel the election until he received the November 14 email from Kroeger and that afterwards he was on the lookout for such conduct. He testified that no one besides Kroeger mentioned the petition to him prior to its submission, and that not a single employee complained to him that they had personally been accosted or offered bribes to sign the petition. Farley further testified that he did not help employees transmit the petition to the Union or other call centers. Although Farley may have been able to see employees walking in the hallways between the interpreters' work stations, Usher, a witness for the Union, conceded that someone seeing this activity would not necessarily know that the employees were moving between workstations because they "could be coming from anywhere."

I found Farley a generally credible witness based on his demeanor, testimony, and the record as a whole. Moreover, his testimony was essentially unrebutted. For these reasons, I fully credit Farley's testimony that he was not involved in any way with the petition. There was no evidence that any other supervisor, manager, or agent of the company was involved in the creation, circulation, or submission of the petition at the Corona facility. Nor was there evidence that any other such individual was aware that the petition was being circulated at the Corona facility during working time. Under the circumstances, I find that the evidence does not show that the Employer encouraged, prepared, instigated, facilitated, or improperly permitted the Corona petition in any way.

Evidence to support the Union's objection is similarly lacking with respect to the petition at the Long Beach facility. The Union presented the testimony of Robert LoParo, an interpreter at the Long Beach facility and one of the three prounion individuals who presented the petition for representation to management. On November 18, LoParo received the petition to cancel the vote in an email from a coworker. The following day, a different coworker showed LoParo the petition in the breakroom. That day, LoParo also saw interpreters passing around a piece of a paper, and heard them saying "sign this, please," but he could not tell whether the paper was the petition, and, at trial, he did not remember who he saw passing it. LoParo stated that the individuals were not on formal, clocked-out, breaks when they were passing the paper. However, the record indicates that this would not necessarily mean that the employees were passing the paper during times when they should have been working since interpreters are allowed 10-minutes of break time per hour and do not clock out for those breaks. Angela Emerson, another Long Beach interpreter, stated that she saw the petition passed at that facility on three occasions during a single morning in October or November. Eventually the petition was passed to her at a time when she was not handling a call, but was not taking an official break.

On Friday, November 23, 2012 (the day after the Thanksgiving holiday), LoParo sent an email about the petition to Ty

Blake-Holden, the manager of the Long Beach facility. LoParo stated that an interpreter had told him that she was feeling accosted at her work station by people attempting to pass the petition. Blake-Holden responded by email the following Monday, November 26. He stated: "You're correct. Nobody should feel accosted in their station. This is not appropriate. Please make sure that this person contacts me directly." There was no competent evidence that any employees contacted Blake-Holden to advise him that they personally had been accosted by a proponent of the antivote petition. Blake-Holden's office afforded a view into one or two interpreter work stations, but not into the hallway between the interpreters' work stations.

Even assuming that LoParo's above-discussed testimony is fully credited, I find that the evidence does not show that the Employer encouraged, prepared, instigated, facilitated, or improperly permitted the Long Beach petition in any way.

The evidence does not substantiate Objection No. 1 with respect to either the Corona or Long Beach facility and that objection is overruled.

OBJECTION 2: The employer maintained and enforced unlawful rules in the workplace that interfered with the exercise of rights guaranteed by Section 7 and interfered with the election.

In its brief, the Union bases this objection on the same two employer rules that the General Counsel alleged were violations of Section 8(a)(1) in the unfair labor practices case discussed above. As found above, the Employer's maintenance of the rule prohibiting employees from "[c]ausing, creating, or participating in a disruption of any kind during working hours on Company property" sets forth an overly broad restriction that interferes with the Section 7 rights of employees to engage in union and/or protected concerted activity. The second rule—the Employer's prohibition on the use of company equipment for anything other than business purposes—is not, under current Board law, considered an improper infringement on Section 7 rights. I see no basis upon which to conclude that that rule is objectionable.

Objection 2 is sustained with respect to both the Corona facility and the Long Beach facility to the extent that the Employer's workplace rule regarding disruptions is overly broad and interferes with the Section 7 rights of employees. The Objection is overruled to the extent that it alleges other objectionable conduct.

OBJECTION 3: The employer made threats of bankruptcy and threatened employees with closure of the facility or loss of work if the workers voted or supported the Union.

OBJECTION 4: The employer made offers of benefits and bribes to employees if they would not support the union.

OBJECTION 5. The employer otherwise threatened employees with loss of benefits if the employees supported the Union.

1. Facts

The Union's argument in favor of sustaining Objections 3, 4, and 5, are based on statements allegedly made by Ferron (the Employer's president and CEO) during his November 16, 2012 presentations to day-shift interpreters at the Corona and Long Beach facilities.[3] These meetings were held 12 days before the union election and for the purpose of trying to persuade employees to vote against representation. A bit of background is necessary to provide context for Ferron's statements during those presentations. For some time prior to the presentations, the Employer had not been profitable. In 2010, the rate at which the FCC reimbursed the Employer for its video interpreting services was reduced by approximately 7 percent and the Employer reacted to the loss of revenue by, inter alia, reducing pay for interpreters and managers, and instituting layoffs. That year, the Employer closed approximately four of its facilities, including the Long Beach facility. Ferron's understanding in 2012 was that the FCC would soon reset the compensation rates for video interpretation services and that the rates would be lowered again at that time. Nevertheless, management was not contemplating closing any facilities. Rather Ferron was planning to expand the company's operations, in part to take advantage of the lower cost of doing business in other geographic areas and also to add interpreters who were not on the certified interpreters' registry and therefore could be employed more cheaply. At some point in late 2011 or early 2012, the Employer reopened the Long Beach facility and rehired some of the interpreters who it had laid off there in 2010.

The Employer also sought to address its financial situation by increasing interpreter productivity. In early October 2012, shortly before the Union petitioned to represent interpreters at the Corona and Long Beach facilities, the Employer raised the productivity benchmarks that it relied on to, inter alia, determine bonuses. The Employer increased the amount of time interpreters were expected to be logged onto the Employer's system and the amount of billable time interpreters were expected to generate.[4] The record indicates that these changes resulted in interpreters being denied bonuses that they would have obtained under the prior productivity standards. Not surprisingly, interpreters disapproved of the new benchmarks and made their disapproval known to the Employer. In a letter to Ferron dated November 20, 2012, the Union noted that the new log-in standards were causing many interpreters "physical pain," and stated that the Union would not take any legal action if the Employer lowered those rates, regardless of whether the facilities were scheduled for a union election. At some point in November 2012—prior to the representation election—the Employer lowered some of the productivity benchmarks, although the benchmarks remained higher than they had been before the increases a month earlier. These changes were made at all facilities, regardless of union activity. It is not clear from the record exactly when in November the productivity standards were eased, but one interpreter at the Long Beach facility first found out about the changes in a November 21 email from the Employer.

[3] At trial there was also testimony about other meetings conducted by Fran Cummings, vice president of operations, and Tanya Monette, vice president of human resources. The Union's brief does not identify any conduct by the Respondent at those meetings that it contends was objectionable.

[4] The Employer refers to its production standards as "key performance indicators" or "KPI."

Ferron made his antiunion presentations at the Corona and Long Beach facilities on November 16, and also made such presentations at five or six other facilities. Ferron prepared a set of notes for these presentations and used the same notes in each instance. Before preparing those notes, Ferron consulted with legal counsel and an outside labor relations consultant. He did not read from the notes, but did refer to them during the presentations in order to remind himself to cover certain topics. At each presentation, Ferron talked for 45 minutes to an hour, and then responded to questions for 30 to 45 minutes.

Corona Presentation

In support of the objections based on Ferron's presentation at the Corona facility, the Union relies on the account given by Ruth Usher, a former video interpreter at that location. The Employer counters Usher's testimony with that of Ferron, who disputes Usher's account in a number of key respects. I do not consider the account of either of these two witnesses to be unbiased or generally more reliable than that of the other regarding disputed matters. Usher served as a union observer during the election and at the time of trial her separation from the Employer was the subject of a pending unfair labor practice charge. On the witness stand, she sometimes gave the impression of straining to support the Union's position. Based on my consideration of Usher's demeanor, testimony, and the record as a whole, I think that her account was tainted by bias. I note, moreover, that no other interpreter who attended Ferron's presentation at the Corona facility testified to corroborate Usher's account.

Ferron's testimony was less than fully reliable since he conceded that he was generally unable to distinguish what he said during his Corona and Long Beach presentations from what he said at any other of the facilities where he spoke against unionization. In general, his testimony regarding what he said at the Corona and Long Beach facilities was rather vague except when he was asked about certain alleged coercive statements, at which points he became quite certain in his denials and seemed more intent on showing that he had not engaged in objectionable conduct than in searching his recollection for an accurate account of his statements. No other attendee was questioned by the Employer to corroborate Ferron's account of the disputed aspects of either the Corona meeting or the Long Beach meeting, although Ferron said that several management and supervisory employees attended the Long Beach meeting.

Some things about Ferron's presentation at Corona are clear. Ferron discussed: the recent decision of Hostess Brands, a company with union-represented employees, to file for bankruptcy; the Employer's own financial challenges and uncertain financial future; a plea that employees delay bringing in a union and allow management time to address employee concerns; the company's priorities in the event that the Union won the right to represent interpreters; and the costs the Employer had incurred to resist the union campaign.

Regarding Hostess Brands, the record indicates that Hostess' situation relative to bankruptcy had been prominent in the news shortly before Ferron gave his presentations at the Corona and Long Beach facilities. Usher testified that, during his Corona presentation, Ferron referenced the Hostess situation and stated that "because of the union, Hostess was filing for bankruptcy," but that Ferron did not elaborate further. At another point in her testimony, Usher stated that Ferron had said something a bit different—"lot of good the union did in order to keep their jobs . . . at Hostess." Ferron testified that his discussion of Hostess during the presentations was confined to one or two sentences. According to him, he stated that he knew that employees were scared, but that "unionization isn't a panacea," as evidenced by the recent events at Hostess. He also testified that he told employees that having a union "was an added cost and it . . . may or may not produce a favorable or desired result from the standpoint of the interpreter." He testified that he said "Hostess, you know—you know, their situation ended in bankruptcy which was disastrous for the company and its employees and nobody was served." Ferron stated that he was fully aware that "bankruptcy" was a "fearful term" to employees and claimed that he "would never use it" in reference to Purple itself. However, he stated that he considered it acceptable to mention the Hostess bankruptcy because "it was a popular topic in the news." He denied that he said that "what happened to Hostess would happen at Purple if employees voted in the Union." Based on the demeanor of the witnesses, the testimony, and the record as a whole, I find that Ferron made the statements regarding Hostess that he admitted to, but do not find a basis for crediting Usher over Ferron regarding additional statements about Hostess.

Regarding the Employer's overall financial situation and future, Usher testified that Ferron told employees that the Employer had "not made a big profit from last year to this year" and that the "overall tone" of Ferron's discussion was that "if we go union, I don't know what's going to happen." She testified that Ferron said, in relation to all employees, that he "couldn't promise that there would be benefits or anything like that in the future," and that he "could not make any promises about the future." For his part, Ferron testified that he told employees that the only promise he could make was that he "was doing his best to grow our company; to . . . increase profitability through productivity standards, through diversification of the company . . . but that it was an uncertain outcome because [he] had an uncertain reimbursement rate" for video interpretation services. He stated that the Employer was evaluating alternatives for expanding capacity at existing call centers and by opening new call centers. He discussed the possibility that benefits would be eliminated as a way of coping with further video interpretation rate reductions. According to Ferron, he also told employees that where the Employer "may have failed" was "in communicating" to employees that the state of their industry had rendered interpreters' expectations about wages and benefits unreasonable. He testified that he told employees: "We are in an uncertain time . . . with declining rates and what I'm trying to do is preserve what all of you have. . . . I can't sit here and give you an expectation of pay increases, increased benefits, things like that. We're all lucky to have a job and I'm trying to preserve what we have." In Ferron's account, he also stated that he wanted the Company to remain the "employer of choice" for video interpreters, but that the interpreters would have to measure what the Company was offering

against the FCC reimbursement rate and what competitors were offering. "Employer of choice" was a term that the Employer had used in the past to mean that the Company respected and valued the interpreters' work and provided competitive wages and benefits. The testimonies of Usher and Ferron about Ferron's statements regarding the Employer's overall financial situation are not contradictory, and I accept that Ferron made the statements recounted by both witnesses on that subject and which are recounted above in this paragraph.

Usher also testified that Ferron told employees that he "would give more or less preferential treatment to the nonunion employees because they were willing to work with him." I do not credit Usher's testimony in this regard. On the face of it, her use of the phrase "more or less" renders this testimony uncertain and/or unclear. Moreover, as stated above, I believe that Usher's testimony was tainted by bias. Usher also testified that Ferron said that if some of the facilities became unionized he would "play hardball with the Union" but that he would "treat" the nonunion facilities "differently." Ferron denied that he said anything about giving less preferential treatment to facilities that voted to unionize. He did, however, testify that one of his basic talking points was that if employees "did not trust" him "it would become a different ballgame." In that case, he told the interpreters, he would have to negotiate in good faith and also "have to get the best deal for the company with the respect to the Union." He testified that he told employees that his focus during such negotiations would be "on the shareholders, the deaf and hard of hearing community, and looking after all of our employees—union, non-union and corporate." Based on the demeanor of the witnesses, the testimony and the record as a whole I do not find a basis for crediting Usher over Ferron regarding the question of whether Ferron made statements threatening to treat employees who unionized worse than employees at nonunion facilities. I do, however, credit Ferron's uncontradicted testimony that he made the statements discussed above with respect to "a different ballgame" and how he would negotiate if the employee's elected union representation.

Ferron also testified that he asked employees to "give" him "another 12 months" to address their concerns without a union. He discussed improving communications by having additional meetings and forums and placing a priority on the issuance of monthly newsletters. He testified that he said:

> [T]here were things that we could hopefully collectively solve . . . if given an opportunity over the next 12 months [to] evaluate whether, you know, conditions in their mind relative to what is controllable versus that which is not controllable has improved or has not improved and you could always address a Union situation 12 months later. But give us an opportunity to bridge that divide.

Ferron discussed employees' concern about the heightened productivity benchmarks. According to him, he stated that the productivity standards were "always fluid" and that the increases were in the interpreters' "best interest despite how they felt about them" because improved productivity allowed management to avoid layoffs and pay cuts. He testified he told employees that, nevertheless, "interpreter health and safety . . . had to come first and foremost" and that the company might have gone too far and "needed to recalibrate" production standards and "were looking at that matter." The portion of Ferron's testimony that is set forth in this paragraph is not directly contradicted as regards the Corona facility and I credit that testimony.

Regarding costs associated with the union campaign, Ferron testified that he said the following:

> And to the degree that we would have communicated better and wouldn't have incurred the cost to fly around the country and encourage a no-vote to these union call centers, think of how much more money the company would have had from a discretionary standpoint. And then we could have done a lot of things with it. We could have invested in further product development. We could have given spot bonuses to the interpreters. A lot of things we could have done that—you know—that money has kind [of] leaked out of the company.

I credit this testimony by Ferron, which was not contradicted by any other witness to his presentation at the Corona facility.

Long Beach Presentation

In support of its objections based on Ferron's presentation to the Long Beach facility interpreters, the Union relies on the testimonies of LoParo and another Long Beach interpreter, Angela Emerson. The Employer again relies on the testimony of Ferron—which generally did not distinguish what he said at the Long Beach presentation from what he said any of the other "vote no" presentations he made around the same time. A number of management and supervisory officials of the Employer were present at the Long Beach talk (including Blake-Holden according to Emerson's account, and Tanya Monette according to Ferron's account)—but Ferron was the only representative of the company who testified about the meeting.

It is undisputed that Ferron mentioned the Hostess bankruptcy at his presentation. He testified that he said that he knew that employees were scared, but that unionization was not a panacea, as evidenced by the bankruptcy at Hostess. He stated further that having a union adds costs and that it might lead to results that employees would not consider favorable. He cited the experience of Hostess, which "ended in bankruptcy which was disastrous for the company and its employees and nobody was served." I credit Ferron's testimony that he made these statements. His testimony was consistent with that of Emerson, who testified that Ferron "brought up . . . the correlation between what our fears were, and Hostess, and what they went through." LoParo testified that Ferron went further and directly stated that the union at Hostess had caused that company to go bankrupt. I do not credit LoParo's testimony that Ferron made that explicit connection over Ferron's contrary testimony. I do not consider LoParo an unbiased witness. He was one of the proponents of unionization who delivered the representation petition to the Employer. Moreover, LoParo's accounts of what Ferron said regarding Hostess varied over the course of his testimony—becoming increasingly damning as the questioning

went on.[5] I was left with the impression that LoParo was not so much trying to recount what Ferron had actually said about Hostess, as trying to convey what he believed was Ferron's implicit message on the subject. In addition, his memory appeared faulty. For example, he testified that Ferron made certain statements about councils and committees, but when confronted with his own notes, he conceded that those statements were made by someone other than Ferron at a different meeting, or possibly only in a company newsletter, and possibly not until after the November 28 elections. Emerson testified at one point that the "feel" of what Ferron was saying was "almost like" "if you vote union, this is going to happen to you," "Union equals, you know, what happened to Hostess." However, after reviewing Emerson's testimony as a whole, I find that at these points in her testimony she was conveying her subjective impressions of Ferron's presentation, not attempting to report his actual statements.[6]

At his Long Beach presentation, as at Corona, Ferron discussed the Company's difficult financial situation, and the challenges posed by rate reductions. LoParo testified that Ferron told the employees that "with some of the requests the Union might [make], it could possibly lead to closing of certain centers or the non-viability of certain centers that decided to go union." After his recollection was refreshed with notes that he prepared several days after the presentation—LoParo quoted Ferron as stating that "depending on the vote, he could either expand [the Long Beach operation], or not." LoParo also testified that Ferron discussed the possibility of eliminating benefits for interpreters in order to address the Company's financial situation. For his part, Ferron testified that he had not talked about closing any facilities or linked the viability of facilities or a reprioritization of facilities to whether those facilities unionized. According to Ferron, he told employees that there was the possibility of expanding the Long Beach operation, "but that a lot of variables went into that," including the "cost of labor" and "the outcome of collective bargaining relative to the pay rate of those interpreters." Ferron stated that he told employees that as a result of declines in the industry, it might be necessary to reduce pay or eliminate certain benefits at all call centers. I find that Ferron made the statements discussed above regarding the Employer's difficult financial situation, the variables that would affect a possible Long Beach expansion, and the possibility of reduced pay and benefits, but do not find a basis for crediting LoParo's testimony over Ferron's denials regarding statements Ferron allegedly made warning that decisions about whether to close, expand, or give preferential treatment to particular facilities would be based on whether employees voted to unionize.

At Long Beach, Ferron also made a plea that employees refrain from bringing in a union and give the Employer a chance to improve matters. As with the Corona talk, I credit Ferron's testimony that at Long Beach he told the interpreters: "There were things we could hopefully collectively solve. . . . If given the opportunity over the next 12 months evaluate whether, you know, conditions in their mind relative to what is controllable versus that which is not controllable has improved or has not improved and you could always address a Union situation 12 months later. But give us an opportunity to bridge that divide." I also find that he told employees "From the standpoint that you've turned towards a union vote, obviously there's things that we as a company could have done better; first and foremost being communication" and that he discussed various steps to improve communication. I also credit his admission that he referenced the heightened productivity standards, stating the changes might have gone "too far," that he would not have made the same changes knowing what he knows now, and that to the extent that the changes were not consistent with the health and well being of interpreters, the company would have to "adjust" as part of "a constant process of recalibration." That testimony was essentially uncontradicted and, to a significant extent, corroborated by LoParo and Emerson.

LoParo also testified that Ferron said: "I've heard you about your needs, but I'm in purgatory. I can't give you anything. . . . Those centers that haven't filed—I can change things for them, [productivity standards] and expectations. For those that filed for unionization, I can't do anything. My hands are tied." LoParo's testimony regarding the language used by Ferron on this subject was confident and detailed. Emerson testified less confidently and in less detail on this subject, but indicated that Ferron had said that he would not be able to take action to adjust productivity standards if the Union was voted in; however, Emerson did not appear to be claiming that Ferron said he could not take such action because the vote was pending. Ferron testified that he did not "talk about changes to the [productivity standards] based on the Union vote." I consider Ferron's testimony on this subject unclear. Although I think Ferron's testimony is fairly understood as denying that he told employees he would decide whether or not to make favorable changes based on the outcome of the Union vote, it is not clear at all that he was also denying that he told employees that the scheduled union election prevented him from making changes. Additional questions were not posed to elicit a clear response from Ferron on the question of whether he told employees that he could not make changes at facilities where a union election was scheduled, but could do so at other facilities. I considered LoParo's testimony on this subject quite credible. He testified confidently and recounted colorful language—e.g., "I'm in purgatory"—that stood out from LoParo's own manner of speech during his testimony and had the ring of truth. Based on the above, I find that Ferron made the statements recounted by LoParo regarding the company's ability to make changes at facilities where no election was scheduled, but not where an election was scheduled.

[5] For example, at one point LoParo recounted that Ferron said: "Did you see the news recently about Hostess? They went union. See what happens there." Later LoParo recounted that what Ferron said about Hostess was: "It was the union that caused Hostess to have to close down and declare bankruptcy."

[6] The test of whether an employer's conduct is objectionable "is not a subjective one, but an objective" one, and "the subjective reactions of employees are irrelevant to the question of whether there was in fact objectionable conduct." *Lake Mary Health & Rehabilitation*, 345 NLRB 544, 545 (2005).

On the subject of addressing employee complaints discussed immediately above, LoParo claims that Ferron went further and stated that the employees who did not want the union "would become his priority" and "pretty much that those who were for the union would be have-nots and those who were against the union would be haves." However, in other testimony he stepped back from this claim, stating that Ferron did not explicitly say who were the "haves" and the "have-nots." Elsewhere in his testimony, LoParo claimed that Ferron clearly warned that he would prefer the nonunion employees, stating that "he considered [the Employer] a family and a business and that, if certain centers decided to go union, he would have to reprioritize and focus on his family." Ferron unequivocally denied telling employees that the nonunion employees would be treated as "haves" or otherwise become his priority, or that he would reprioritize based on whether a facility was unionized. In addition, Emerson, the Union's other witness regarding the Long Beach presentation, did not recount the additional statements alleged by LoParo regarding giving priority to some facilities, or treating them as "haves" because they did not support the Union. I do not find a basis for crediting LoParo's testimony over Ferron's on this subject.

Ferron testified about a number of statements he says he made regarding his plans in the event that the facility rejected his plea for more time and voted for the Union. He testified that he told employees that his "first and foremost attention" would be to "our shareholder base . . . the people who own the company" and that he had to be concerned about the "deaf and hard of hearing consumers [that] rely upon [the Employer] for communication." He testified that he said that if employees voted in favor of union representation he would have to bargain in good faith and "would negotiate to get the best possible outcome that [he] could on behalf of all those constituents" and would want "to have the non-Union and Union centers be aligned with regards to, you know, economic incentives, the productivity standards, and the general, you know, care and maintenance of being an employer to all of them." I credit this testimony by Ferron, which was not directly contradicted by other witnesses to the Long Beach presentation.

The witnesses for both sides are in agreement that Ferron made some remarks about the money that the company had expended campaigning for a "no vote" on unionization. In Ferron's account, he told employees that if he had communicated with employees more effectively in the past, and thereby avoided the costs of campaigning for a no-vote, the company would have had more discretionary money to use for things such as product development and employee bonuses. In LoParo's account, Ferron said "We've spent so much money on the unionization issue, traveling around, et cetera, that we should have just paid out the bonus" or that if they had not expended that money they could have "possibly paid out bonuses to [the interpreters]."[7] Emerson gave a slightly different account. She stated that when people asked about their bonuses, Ferron stated that they had not reached the new benchmarks for receiving them. Then, Emerson recounts, Ferron went on to state that "he didn't want to have to spend all this money on a union buster, that . . . he should have just used all that money to just pay us our bonuses." The various accounts about what Ferron said regarding the costs of the Employer's antiunion campaign are not clearly contradictory and I find that he made all the statements discussed in this paragraph.

2. Analysis

The Union argues that Objection No. 3 is substantiated by the statements that Ferron made regarding the Hostess bankruptcy, the Employer's financial issues and lack of profitability, and the possibility that the Union's demands might lead to the closing or nonviability of facilities that elected union representation. I find that this objection is not substantiated for either the Corona facility or the Long Beach facility.

As discussed above, I find that Ferron discussed the recent bankruptcy of Hostess, and the presence of a union at that company, as evidence that "unionization is not a panacea," and that it would not necessarily be a solution to the interpreter's problems, but could, instead, have an outcome unfavorable to the interpreters and the Employer. Contrary to the Union's contention, this statement is not an unlawful threat of bankruptcy. In *Parts Depot, Inc.*, the Board found that a similar statement by a manager was not impermissibly coercive. 332 NLRB 670 fn.1 (2000), enfd. 24 Fed. Appx. 1 (D.C. Cir. 2001). The manager in that case stated: "Remember what happened to Eastern Airlines. Because they let the union in they went bankrupt." The Board held that the statement was at most "a misrepresentation as to what caused Eastern to go bankrupt, not an implicit statement that the [employer] would take action on its own to declare bankruptcy if the Union won the election." Id.; cf. *Eldorado Tool*, 325 NLRB 222, 223 (1997) (employer unlawfully threatened plant closure when it displayed a series of tombstones with the names of closed union factories, culminating, on the day prior to the representation election, with a tombstone bearing the name of the employer itself and a question mark). If anything, Ferron's statement was marginally less threatening than the one in *Parts Depot* since in that case the manager explicitly stated that unionization had caused the bankruptcy of Eastern Airlines, whereas I find that Ferron noted a correlation, but did not explicitly claim causation. Moreover, Ferron did not suggest that Hostess purposely chose to declare bankruptcy rather than deal with a union, but rather suggested that Hostess was forced into bankruptcy for economic reasons that unionization was either unable to ameliorate or negatively influenced. Thus Ferron's reference to Hostess cannot in my view be reasonably viewed as a threat that the Employer would choose to declare bankruptcy, or close union facilities, in order to avoid dealing with a union. I do not doubt that Ferron was hoping that the interpreters would see Hostess' experience not only as

[7] LoParo further testified: "In effect [Ferron] was saying, 'Fighting the union now is taking out the resources that I would have normally given to you, but now that you're going pro-union that makes you have nots again. It means that you can't earn that money, that bonus. It's not available for you anymore.'" I do not understand LoParo to be testifying that Ferron actually made these statements. Rather given LoParo's statement that this was "in effect" what Ferron was saying, I understand LoParo to be paraphrasing what he took to be Ferron's message, not reporting his exact words.

evidence that unionization was not a "panacea," but also as cause to fear that bringing in the Union at Purple would negatively affect the economic future of the facility. Indeed, Ferron conceded he was aware that the use of the word "bankruptcy" was frightening to employees. However, based on *Parts Depot*, I find that his statement did not impermissibly cross the line between a statement about the experience at one unionized employer and a threat that the Employer would choose to file for bankruptcy or close down facilities rather than deal with a union.[8]

I conclude that the evidence does not substantiate Objection 3 at either the Corona or the Long Beach facility, and that objection is overruled.

The Union argues that Objection 4 is substantiated by Ferron's statements that, if the employees gave him a year he would try to fix things without a Union, and that he would be able to change productivity standards for facilities that had not unionized or filed for unionization, but could not make such changes for those facilities that had done so. The Union argues further that this objection is substantiated by Ferron's statements that he wished to return to being the "employer of choice" for video interpreters.

An employer unlawfully coerces employees when it promises improvements in wages, benefits, and other terms and conditions of employment if employees vote against a union. *DTR Industries*, 311 NLRB 833, 834 (1993), enf. denied on other grounds 39 F.3d 106 (6th Cir. 1994); see also *Curwood Inc.*, 339 NLRB 1137, 1147–1148 (2003), enfd. in pertinent part 397 F.3d 548 (7th Cir. 2005) (promise to improve pension benefits violated Section 8(a)(1) where the respondent was reacting to knowledge of union activity among its employees). I find that in this case the Employer did not make an improperly coercive promise. Ferron asked the employees to give the company another year to see whether by improving communication, and working together, they could address employees' concerns. The evidence showed not only that Ferron did not promise increases in wages or benefits, but that he specifically stated that he could not promise improved wages and benefits or even guarantee that there would not be decreases.

Although it is a closer question, I also conclude that Ferron did not make an unlawful promise regarding productivity standards. During both his Corona and Long Beach presentations to employees, Ferron asked the employees to give the Company 12 months to improve communications and work with employees to address their concerns. He allowed that the Employer might have gone too far in raising productivity standards, that setting productivity standards involved an ongoing process of recalibration, and that he was looking into the matter. I conclude that these statements at Corona and Long Beach did not constitute a coercive promise. At the outset I note that the evidence does not show that he made any promise at all. He did not describe specific new productivity standards or promise that any changes he made in the future would necessarily be ones that the employees would approve of. He simply asked for another chance, conceded that the company might have gone too far with productivity standards and stated that the Company was looking into the matter as part of an ongoing process of recalibration. In *Noah's New York Bagels*, 324 NLRB 266 (1997), the Board considered circumstances very similar to these and found that the employer's president did not violate the Act during a captive audience speech the day before a union election by: asking employees to give "us a second chance to show what we can do," admitting that the company had made mistakes, stating that the best way to overcome the mistakes was to work together without the involvement of a third party, and stating that the presence of a third party creates costs for both the company and employees and does not guarantee "job security, fair treatment good wages and benefits, and a warm friendly work environment." The Board noted that an employer's"[g]eneralized expressions . . . asking for 'another chance' or 'more time,' have been held to be within the limits of permissible campaign propaganda" when the employer does not "make any specific promise that any particular matter would be improved." *Noah's Bagels*, 324 NLRB at 266–267, citing *National Micronetics*, 277 NLRB 993 (1985). Nor did Ferron violate the Act by stating that Purple wanted to be the "employer of choice" for interpreters. This, too, was not a promise of any specific changes, but no more than propaganda about what the Company claimed would be its generally respectful and favorable treatment of interpreters.

I find, however, that Ferron did engage in objectionable conduct by stating to the Long Beach interpreters that he could not make changes to address employees' discontents given that a union election was scheduled, although he could make such changes at those facilities where a union vote was not scheduled. That characterization of the situation is clearly at odds with Federal law. In *Lampi, LLC*, 322 NLRB 502 (1996), the Board stated: "As a general rule, an employer's legal duty in deciding whether to grant benefits while a representation proceeding is pending is to decide that question precisely as it would if the union were not on the scene." As was observed in *First Student, Inc.*, 359 NLRB No. 120, slip op. at 5 (2013), employers misstate the law when they tell employees that because they are awaiting a scheduled union election "they are caught between a proverbial 'rock and a hard place.'" Neither granting nor withholding improvements is illegal unless "the employer is found to be manipulating benefits in order to influence his employees' decision during the union organizing campaign." Id. In this case, I find that Ferron unlawfully coerced employees by blaming the upcoming union election for his purported inability to make changes to address employees' discontent.

[8] In its brief, the Union notes that Emerson believed that the message that Ferron was conveying about Hostess was "If you vote for the Union, this is going to happen to you . . . the company would cease to exist or we wouldn't have jobs anymore." However, the subjective impression of Emerson is not determinative since "[t]he test is not a subjective one but an objective" one, and the "subjective reactions of employees are irrelevant to the question of whether there was in fact objectionable conduct." *Lake Mary Health & Rehabilitation*, 345 NLRB at 545. In this case, Ferron's statements regarding Hostess cannot objectively be seen as a threat that he would choose to close the facility or declare bankruptcy rather than deal with the Union.

Objection 4 is sustained with respect to Ferron's speech at the Long Beach facility and overruled with respect to Ferron's speech at the Corona facility.

The Union argues that Objection 5, which states that the Employer threatened interpreters with loss of benefits if the employees supported the Union, is substantiated at the Corona facility by Ferron's statement that he could not make any promises that the Company would continue to provide benefits for full-time and part-time interpreters. The statement that the Union relies on does not attach the possible discontinuation of benefits to the Union vote or its outcome. In fact, Ferron mentioned discontinuing benefits in the context of a discussion of the financial challenges facing the Employer and the various actions being contemplated to address those challenges. The actions he mentioned included expanding some facilities, creating new facilities, diversifying the company and increasing productivity—not just eliminating employee benefits. I find that the record does not show that these statements by Ferron at the Corona facility were improperly coercive as alleged in Objection 5.

The Union argues that Objection 5 is supported with respect to the Long Beach facility by evidence that Ferron said he was considering eliminating benefits as a means of saving money and that he would be unable to help those interpreters at unionized facilities. As discussed above, I found that the evidence did not show that Ferron told employees that he would be unable to make positive changes for employees if they elected to be represented by the Union. He did make reference to the possibility of cutting benefits, but as at Corona, this was in the context of a discussion of a variety of ideas that the company was contemplating to address its financial challenges and was not linked to the results of the union vote.

Objection 5 is overruled with respect to both the Corona facility and the Long Beach facility.

OBJECTION 6: The *Excelsior* List was inadequate. It did not contain email address[es], work shifts, rates of pay, and phone numbers.

By letters dated October 25, 2012, the Acting Regional Director for Region 21 of the Board notified the managers of the Corona and Long Beach facilities of the Employer's obligation, pursuant to the terms of the election agreement, to provide "an election eligibility list containing the full names and complete addresses (including postal zip codes) of all the eligible voters who were on the Employer's payroll for the period ending Sunday, October 14, 2012." Similarly, the election agreement that the parties executed for each facility stated that the Employer had agreed to provide "an election eligibility list containing the full names and addresses of all eligible voters" and cited *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966), and *North Macon Health Care Facility*, 315 NLRB 359 (1994). Neither document imposes on the Employer an obligation to include email addresses, work shifts, rates of pay, or phone numbers, as part of the election eligibility lists. There is no dispute that the Employer provided election eligibility lists containing all of the information required by the October 25 letters from the Board and by the election agreements between the parties. The Union did not even present evidence establishing that, prior to the election, it notified the Employer that the Union considered the election eligibility list to be deficient.

In its brief, the Union presses its claim that the Employer engaged in objectionable conduct by failing to include employees' email addresses on the election eligibility list, but makes no argument that it was objectionable not to include information about work shifts, rates of pay, or phone numbers. Even regarding the subject of email addresses, the Union concedes that "the Board has not yet required an employer to provide employees' email addresses in order to fulfill its *Excelsior* duty." The fact is that the Board has specifically held that an employer's obligation under *Excelsior*, supra, does not extend to providing email addresses for the eligible employees, even when the union made a specific preelection request for such information. *Trustees of Columbia University*, 350 NLRB 574 (2007). The Union makes a conclusory assertion that "in the particular circumstances of this case" additional information should have been provided, but it does not identify any special circumstances that would justify departing from the established standards. I conclude that the evidence does not show that the election eligibility lists provided by the Employer were inadequate under either Board law or the election agreement between the parties.

Objection 6 is not substantiated and is overruled.

VI. ANALYSIS OF THE SUSTAINED OBJECTIONS

At both the Corona and Long Beach facilities, the Employer maintained an overly broad rule that violated Section 8(a)(1) and constituted objectionable conduct. In addition, the Employer engaged in objectionable conduct when, at the Long Beach facility, Ferron told employees that because a union election was scheduled there he could not make changes to address employees' discontents, but that he could make changes at others facilities where a union election was not scheduled. The question is whether these objections are sufficient to warrant setting aside the election at either facility. The Board has stated that "[r]epresentation elections are not lightly set aside." *Safeway, Inc.*, 338 NLRB 525 (2002). "[T]he Board sets aside an election and directs a new one when unfair labor practice violations have occurred during the critical period,[9] unless the violations are de minimis." *PPG Aerospace Industries*, 355 NLRB No. 18, slip op. at 4 (2010). "In determining whether misconduct is de minimis, the Board considers such factors as the number of violations, their severity, the extent of their dissemination, the number of employees affected, the size of the bargaining unit, the closeness of the election, and the violations' proximity to the election." Id., citing *Bon Appetit Mgt. Co.*, 334 NLRB 1042 (2001); see also *First Student, Inc.*, 359 NLRB No. 120, slip op. at 4 (2013) (when election results are close, objections must be carefully scrutinized); *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995) (same).

Turning first to the Corona facility, I find that the circumstances there do not warrant setting aside the election. Only a single objection was sustained with respect to that facility—the

[9] The "critical period" is the interval from the date of the filing of the petition to the time of the election. *Goodyear Tire & Rubber Co*., 138 NLRB 453 (1962).

maintenance of an overly broad rule regarding employee involvement in "disruptions." The Board has found that the mere maintenance of an invalid rule may be an insufficient basis on which to overturn election results. See, e.g., *Delta Brands, Inc.*, 344 NLRB 252, 253 (2006); *Safeway, Inc.*, 338 NLRB 525, 525–526 (2002). I note, moreover, that the evidence in the instant case did not show that the Employer enforced this rule at all during the critical period, much less that it enforced the rule against employees for engaging in union or protected concerted activity. Nor did the evidence suggest that any employee refrained from protected activity because of the rule. In any event, the Corona vote was not particularly close—16 ballots were cast against union representation, and only 10 in favor of it, with 1 challenged ballot. I conclude that the employer engaged in only de minimis misconduct which, under the circumstances here, did not affect the outcome of the election at the Corona facility.

With respect to the Long Beach facility, the situation is different. At that facility the Employer acted unlawfully both by maintaining the overly broad rule and also when Ferron told the interpreters that he could not make changes to address their discontents given that a union election was scheduled, but that he could make such changes at those facilities where a union vote was not scheduled. This statement was made less than 2 weeks before the election and was broadly disseminated at a meeting held for all the interpreters present at the facility. In *First Student, Inc.*, the Board required that an election be set aside where, during the critical period, the employer told employees that it was not granting wage increases because Federal law prohibited them from making unilateral changes to the current pay scale when there is a union election pending. 359 NLRB No. 120, slip op. at 5. Like the speaker in that case, Ferron was essentially blaming the union campaign for the Employer's refusal to make changes favorable to employees. In the instant case the misconduct is similar, but in certain respects both more severe and less severe than in *First Student*. It is more severe in that Ferron not only stated that he could not address the Long Beach employees' concerns because the union election was upcoming, but also contrasted that with the situation that would pertain if a vote was not scheduled and he could make changes. Those statements would certainly provide fuel for the efforts at Long Beach to persuade interpreters to petition for cancellation of the upcoming election. Although the election was not, in fact, cancelled, it is reasonable to infer that at least some of the antiunion sentiment generated or harnessed during the effort to cancel the election would carry over when the Union vote was held. On the other hand, the misconduct here was less severe than in *First Student*, because it was not shown that the Employer, in fact, withheld any benefit because a union vote was upcoming or in order to influence that vote.

On balance, I conclude that Ferron's statement that he could make changes to address employee discontent at facilities where a union vote was not scheduled, but could not do so at those where a union vote was scheduled, interfered with employees' free choice in the election and warrants setting aside the November 28, 2012 election at the Long Beach facility. In reaching this conclusion, I rely not only on the nature of the misconduct, the fact that Ferron's statement was disseminated to a large group of employees, and the temporal proximity of that statement to the election, but also on the extremely close margin by which the election at Long Beach was decided. Fifteen valid ballots were cast in favor of union representation, and 16 against it. Thus, if Ferron's misconduct caused even a single eligible voter to cast a ballot against, rather than for, union representation, then the outcome of the election was altered by that misconduct. For the reasons discussed above, I recommend that the November 28, 2012 election at the Long Beach facility be set aside, and that a new election be held.

CONCLUSIONS OF LAW

1. The Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Employer has violated Section 8(a)(1) of the Act since June 19, 2012, by maintaining a rule prohibiting employees from "[c]ausing, creating, or participating in a disruption of any kind during working hours on Company property" because that rule creates an overly broad restriction that interferes with the Section 7 rights of employees to engage in union and/or protected concerted activity.
4. Objection 2 is sustained with respect to the Corona facility and the Long Beach facility
5. Objection 4 is sustained with respect to the Long Beach facility.
6. Objections 1, 3, 4, 5, and 6 are overruled with respect to the Corona facility.
7. Objections 1, 3, 5, and 6 are overruled with respect to the Long Beach facility.
8. The objectionable conduct engaged in by the Employer at the Corona facility during the critical election period did not have a more than de minimis impact on the election.
9. The objectionable conduct engaged in by the Employer at the Long Beach facility during the critical election period had an impact on the election, and that impact was more than de minimis.

REMEDY

Having found that the Employer has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order and Direction.[10]

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Employer, Purple Communications, Inc., Corona and Long Beach, California, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining any rule that prohibits employees from "causing, creating, or participating in a disruption of any kind" or that otherwise creates an overly broad restriction that interferes with the Section 7 rights of employees to engage in union and/or protected concerted activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Delete the unlawful workplace rule that prohibits employees from "causing, creating, or participating in a disruption of any kind" from the current version of its employee handbook and notify employees that this has been done.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Employer has taken to comply.

IT IS FURTHER ORDERED that the election held on November 28, 2012, in Case 21–RC–091584 is set aside and that this case is severed and remanded to the Regional Director for Region 21 for the purpose of conducting a new election.

DIRECTION OF A SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the date of the first election and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Communications Workers of America, AFL–CIO.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 21 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994).

The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. October 24, 2013

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain any rule that prohibits you from "causing, creating, or participating in a disruption of any kind" or that otherwise creates an overly broad restriction that interferes with your Section 7 rights to engage in union and/or protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL delete the unlawful workplace rule that prohibits you from "causing, creating, or participating in a disruption of any kind" from the current version of our employee handbook and notify you that this has been done.

PURPLE COMMUNICATIONS, INC.